

No. 04-3548

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**FILED**

MAR 11 2005

LEONARD GREEN, Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

GREGORY A. CONN,

Defendant-Appellant.

ORDER1:02cr96  
Weber

Before: MARTIN, GILMAN, and FRIEDMAN,\* Circuit Judges.

Gregory A. Conn appeals a district court order that denied his motion for an extension of time in which to file a motion for relief from judgment under 28 U.S.C. § 2255. This case has been referred to a panel of the court pursuant to Rule 34(j)(1), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

On September 25, 2002, Conn pleaded guilty to attempting to manufacture methamphetamine and maintaining a place for the purpose of manufacturing methamphetamine. Conn was sentenced to concurrent terms of 60 months and 63 months of imprisonment, respectively, and the district court entered judgment in January 2003. Conn did not file a direct criminal appeal.

On March 22, 2004, Conn filed his motion for an extension of time in which to file a petition for a writ of habeas corpus. The district court denied the motion. Conn filed a timely notice of appeal.

On appeal, Conn contends that equitable tolling of the applicable limitations period should apply in this case and identifies claims he intends to present in his prospective § 2255 motion. The

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\*The Honorable Daniel M. Friedman, United States Circuit Judge for the Federal Circuit, sitting by designation.

Attest:

LEONARD GREEN, Clerk

By:

Deputy Clerk

No. 04-3548

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government responds that the district court properly denied Conn's motion for an extension of time. Upon consideration, we dismiss the appeal for lack of appellate jurisdiction.

Federal courts have held that they lack jurisdiction to consider the timeliness of a § 2255 motion until a § 2255 motion is actually filed. *See United States v. Leon*, 203 F.3d 162, 164 (2d Cir. 2000); *United States v. Chambliss*, No. 97-1655, 1998 WL 246408, at \*1 (6th Cir. May 4, 1998) (unpublished); *In re Application of Wattanasiri*, 982 F. Supp. 955, 957-58 (S.D.N.Y. 1997). Before the filing of a § 2255 motion, no case or controversy is pending, and federal courts do not render advisory opinions. *See U.S. Nat'l Bank of Oregon v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 446 (1993); *Leon*, 203 F.3d at 164. An exception exists where a pro se litigant's motion for an extension of time, liberally construed, contains allegations sufficient to support a claim under 28 U.S.C. § 2255. *Green v. United States*, 260 F.3d 78, 82-83 (2d Cir. 2001).

Here, Conn's motion for an extension of time in which to file a petition for a writ of habeas corpus contains no references to any claims that might be cognizable under 28 U.S.C. § 2255. *See Green*, 260 F.3d at 84. Before this court, Conn attempts to assert in the first instance claims he intends to present in his prospective § 2255 motion. However, claims not presented in the district court are not properly considered in the first instance on appeal. *See Weinberger v. United States*, 268 F.3d 346, 352 (6th Cir. 2001); *Byrd v. Collins*, 209 F.3d 486, 538-39 (6th Cir. 2000); *Chandler v. Jones*, 813 F.2d 773, 777 (6th Cir. 1987). Under these circumstances, no case or controversy exists until Conn files a motion for relief under § 2255. Accordingly, Conn's appeal must be dismissed for lack of jurisdiction.

For the foregoing reasons, the appeal is dismissed for lack of jurisdiction.

ENTERED BY ORDER OF THE COURT

  
Clerk

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

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Filed: March 11, 2005

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RE: 04-3548  
USA vs. Conn  
District Court No. 02-00096

Enclosed is a copy of an order which was entered today in the above-styled case.

Jill Colyer  
Case Manager

Enclosure  
Certified copy of order to:  
Honorable Herman J. Weber  
Mr. James A. Bonini

Mr. James A. Bonini, Clerk  
Southern District of Ohio at Cincinnati  
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